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No. 81-85
IN THE

Supreme Court of the United States

October Term, 1981.

DARCLY, INC., a California Corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES, THE BUSINESS LICENSE COMMISSION OF THE COUNTY OF LOS ANGELES, THE LICENSE APPEALS BOARD OF THE COUNTY OF LOS ANGELES AND PETER J. PITCHESS, SHERIFF OF THE COUNTY OF LOS ANGELES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT.

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Questions Presented for Review.

1. Whether the conviction of the licensee's employee for obscene live conduct in the furtherance of its licensed business is a constitutional and reasonable basis for revocation of its entertainment and public eating licenses?

2. Whether petitioner's claim of facial overbreadth in Section 91.9 of Los Angeles County Ordinance No. 5860 is real and substantial?

3. Whether the petitioner was afforded appropriate procedural safeguards at the administrative revocation hearing?

4. Whether there were adequate grounds for the revocation of the petitioner's public eating license?

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INTRODUCTORY MATTER.

The topics headed "Parties to this Proceeding", "Opinions of Courts and Administrative Agencies Below", and "The Grounds on which Jurisdiction of this Court is Invoked" in the Petition for Writ of Certiorari in the instant matter are incorporated by this reference in this Brief in Opposition.

The item headed "The Ordinances Which Are Involved in This Case" and the Appendices to the Petition for Writ of Certiorari are incorporated by this reference in this brief and supplemented as hereafter indicated.

STATUTES AND ORDINANCES INVOLVED.

California Penal Code Section 311.6.

Every person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or before an assembly or audience consisting of at least one person or spectator in any public place or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other token, is guilty of a misdemeanor.

Los Angeles County Ordinance No. 5860

Sec. 16. Illegal Occupations.

A license granted pursuant to this ordinance does not permit any occupation or activity of any kind which is prohibited by this, or any other ordinance, or by any state statute, law, rule, order or regulation.

Sec. 82.7. (10,545 8-11-72) Grounds for Denial. Activities which may Involve Free Speech.

The following shall constitute grounds for denial of a license for a bookstore, exhibition, traveling show, motion picture theatre, sound or advertising vehicle, model studio, picture arcade, entertainment as defined in Article 1 of Chapter XVII, Outdoor Festivals or Growth Centers. This section does not apply to security guards as provided for in Section 3244:

(a) The building, structure, equipment or location of such business does not comply with or fails to meet all of the health, zoning, fire and safety requirements or standards of all the laws of the State of California or ordinances of the County of Los Angeles applicable to such business operation.

(b) The applicant, his employee, agent or manager has knowingly made any false, misleading or fraudulent statement of material fact in the application for a license or in any report or record required to be filed with the Tax Collector.

Sec. 91 (9962 3-20-70) Right to Revoke.

Every license granted under this ordinance or any section thereof is granted and accepted by all parties with the express understanding that the Commission may hold a public hearing, notice of the time and place of which shall be given to the licensee, and that if, after such hearing, the Commission finds that any grounds of revocation exist, the Commission may revoke or suspend such license, and that if the facts or conditions constituting the grounds of revocation are an immediate threat to the public peace, health, or safety, the Commission, pending such hearing, may suspend such license for not more than sixty days.

Sec. 135.15.5 (9848 9-16-69) Findings.

Written findings of fact are not required unless requested at the hearing by a party thereto. The findings if any, may be stated in the language of the pleadings or by reference thereto.

STATEMENT OF THE CASE AND MATERIAL FACTS.

Petitioner DARCLY, INC. (hereinafter DARCLY), a California corporation, owns and operates a business establishment known as Clyde's bar in the County of Los Angeles. The petitioner had obtained licenses from Respondent County of Los Angeles (hereinafter COUNTY) to present entertainment and to serve food, as required by Los Angeles County Ordinance No. 5860.

Said Ordinance is administered by Respondent BUSINESS LICENSE COMMISSION (hereinafter COMMIS-

SION), which hears and determines thereunder whether or not to grant applications for licenses as well as whether or not to suspend or revoke licenses currently held by licensees. Further, under said ordinance, Respondent LICENSE APPEALS BOARD (hereinafter BOARD) considers the appeals of applicants for licenses or licensees from adverse determinations of Respondent COMMISSION, typically by reviewing the administrative record of the hearing(s) below. The provisions of Los Angeles County Ordinance No. 5860 are enforced by Respondent PETER J. PITCHESS, Sheriff of the County of Los Angeles (hereinafter SHERIFF).

At a noticed hearing on February 2, 1977 of Accusation No. 412, which accusation is set forth in Appendix IV of the petition, Respondent SHERIFF had the burden of proving the allegations therein and supporting his recommendation to Respondent COMMISSION that petitioner's entertainment and public eating licenses should be revoked. The factual grounds for the sought revocation of petitioner's entertainment license were that its employee, Deborah Lalydia Beauford, while acting as a performer and waitress at its licensed premises on February 27, 1976, had engaged in a variety of conduct, which led to her arrest and the arrest of Larry Steve Johansen, identified as the manager of Clyde's bar, for violating California Penal Code Section 311.6. Miss Beauford was eventually convicted of the charge. Under Section 91.9(b)(1) of Los Angeles County Ordinance No. 5860, set forth at pp. 5-7 of the petition, an entertainment license is subject to revocation if the licensee, his employee, agent or manager has been convicted in a court of competent jurisdiction of any violation of a statute while performing any act(s) pursuant to the entertainment license. Essentially the same factual grounds were urged by Respondent SHERIFF as a basis for the sought revocation of the petitioner's public eating license. The petitioner had

filed a notice of defense to Accusation No. 412, as required by Ordinance No. 5860. The petitioner's notice of defense is set forth in Appendix 1 herein.

The evidence presented by Respondent SHERIFF to Respondent COMMISSION consisted of the testimony of deputy sheriff Russell L. Petrie, who observed a number of the performances and other activities in Clyde's bar, and documentary evidence of Miss Beauford's conviction. Deputy sheriff Petrie testified that he observed Miss Beauford, after removing her bra and bikini bottom, lie down on the stage with her legs extended apart over her head and manipulate and massage her vaginal area for some time so that the lips of her vagina opened and closed. Getting up from the floor, she gyrated her hips and performed "bumps and grinds" for the audience. With her torso facing upward and supporting herself with her hands and feet, she moved in this manner with a crab-like motion, until, reaching a patron at the periphery of the stage, she placed her legs and thighs over his shoulders and brought her vagina within inches of his face while gyrating her pelvic area. She would also squat in close proximity of a patron while manipulating the lips of her vagina. Miss Beauford similarly disported herself during her other sessions on the stage. After she had left the stage and dressed herself in her bikini bottom and brief top, deputy sheriff Petrie observed her place her buttocks in the proximity of a patron's crotch and gyrate her hips while serving the patrons as a waitress (State court clerk's transcript, pp. 43-48). The cross-examination of deputy sheriff Petrie merely reiterated and amplified in greater detail the nature and extent of Miss Beauford's conduct (State court clerk's transcript, pp. 53-61.)

Periodically deputy sheriff Petrie observed petitioner's employee Larry Steve Johansen, the manager of Clyde's bar, watch some of Miss Beauford's conduct on stage, direct

various employees in their duties, and move about the premises. (State court clerk's transcript, pp. 51-52). Deputy sheriff Petrie made the foregoing observations over a period of approximately an hour.

No representative, officer, or employee of the petitioner, apart from its attorney, appeared or testified at the hearing before Respondent COMMISSION. The petitioner's attorney testified briefly that he was Miss Beauford's attorney in the criminal proceeding arising from her arrest, and that her conviction was under appeal. (State court clerk's transcript, pp. 72-73). Apart from this testimony and cross-examination of deputy sheriff Petrie, no other evidence was offered on behalf of the petitioner. No findings were requested by the petitioner or its attorney. Miss Beauford's conviction was later upheld on appeal. *People v. Beauford*, 79 Cal.App.3d Supp.1, 145 Cal.Rptr. 173 (1978).

On February 2, 1977, Respondent COMMISSION found accusation No. 412, as amended, to be true and correct and revoked the petitioner's entertainment and public eating licenses. The petitioner filed an administrative appeal with Respondent BOARD on February 15, 1977. Respondent BOARD reviewed the record of the administrative proceedings before Respondent COMMISSION and denied the administrative appeal on December 28, 1977.

The petitioner thereafter brought an action in the California Superior Court to set aside the revocation orders of Respondent COMMISSION. The petition is set forth in Appendix 2 herein. Following hearing, the petition for a writ of administrative mandamus was denied on May 8, 1978. The Superior Court found that the petitioner had received a full and fair hearing at the administrative level; that the evidence presented against the petitioner was not controverted in any essential respect; and that the petitioner had failed to request written findings of fact as provided in

Section 135.15.5 of Los Angeles County Ordinance No. 5860. Therefore, the administrative finding that accusation No. 412, as amended, was true and correct sufficed under the circumstances. The Superior Court further found that this administrative finding was supported by the weight of the evidence and constituted grounds for revocation of the petitioner's entertainment and public eating licenses. Section 91.9(b)(1) of Los Angeles County Ordinance No. 5860 is a valid and constitutional ground upon which to base revocation of the petitioner's entertainment license, the Superior Court concluded, as are Sections 92(b), 92(c), 92(e), 92(f), 92(j) and 92(k) of said ordinance valid and constitutional grounds upon which to base revocation of petitioner's public eating license. The Superior Court's Judgment Denying Petition for Writ of Mandate and its Findings of Fact and Conclusions of Law are set forth in Appendix VIII to the petition.

The petitioner filed its notice of appeal from the Superior Court judgment on July 6, 1978. Having thereafter unsuccessfully petitioned the California Court of Appeals, Second Appellate District, for a writ of supersedeas and stay of the revocation orders, the petitioner sought a hearing in the California Supreme Court with regard to said denial, which also was denied on August 16, 1978. The stay of revocation orders permitted under California Code of Civil Procedure section 1094.5 dissolved on July 26, 1978. Meanwhile, after separate administrative proceedings instituted by the California Department of Alcoholic Beverage Control, the revocation of the petitioner's on-sale beer license became final (Appendix 3).

During the pendency of its appeal in the instant case, the petitioner sought federal court intervention by bringing an action for injunctive and declaratory relief under 42 U.S.C. §1983 and 28 U.S.C. §§2201, 2202 in the United States

District Court for the Central District of California. *Darcly, Inc. v. Peter J. Pitchess, etc.*, U.S.D.C. Case No. CV 78-4333-MRP. The petitioner essentially argued that various provisions of Los Angeles County Ordinance No. 5860 are unconstitutional under the First Amendment and that thus enforcement of said ordinance as to its business operations should be enjoined. Following hearing of cross-motions for preliminary injunction and dismissal, the United States District Court dismissed the action on January 15, 1978, finding that federal intervention was inappropriate in the absence of any showing that the challenged ordinance provisions were patently or flagrantly unconstitutional. The District Court's Judgment and Findings of Fact, Conclusions of Law and Order Denying Motion for Preliminary Injunction and Granting Motion to Dismiss are set forth in Appendix 4 herein.

In the instant case, California Court of Appeal affirmed the Superior Court judgment on January 26, 1981. The appellate court rejected the petitioner's contention that revocation of a license is indistinguishable from denial of an application for a license and that nude conduct in bars is tantamount to the sale of books for purposes of the First Amendment. The appellate court concluded that Los Angeles Ordinance No. 5860 clearly sets forth standards for revocation that are constitutionally adequate. The opinion of the California Court of Appeal is set forth in Appendix 1 to the petition. The Court of Appeal denied the petitioner's request for rehearing on February 13, 1981 and the California Supreme Court denied petitioner's request for hearing on April 16, 1981.

Notwithstanding any suggestions to the contrary in petitioner's brief or other documents presented to this Court, petitioner has not ceased its operations. With the exception of a brief lapse in its operations when it sought intervention

by the federal district court, and, despite its lack of an alcoholic beverage license, the petitioner has largely remained in operation during the foregoing proceedings.

ARGUMENT.

I.

The Revocation of the Petitioner's Entertainment License for Its Employee's Violation of a Penal Statute Was a Reasonable and Constitutional Exercise of the County's Police Power.

This Court has expressed the view in various cases involving state regulation of adult entertainment establishments that nude conduct occupies a low rank in the hierarchy of protected expression. *California v. LaRue*, 409 U.S. 109, 117 (1974). *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976). The California Supreme Court shares this view of nude conduct in business establishments. *Crownover v. Musick*, 9 Cal.3d 405, 425-428, 107 Cal.Rptr. 681, 509 P.2d 497 (1973), *cert. denied sub. nom. Reynolds v. Sacramento County, Owen v. Musick*, 415 U.S. 931 (1974). The police power of Respondent COUNTY clearly permits regulation related to nude conduct in bars or public eating places. *Crownover v. Musick, supra*, 9 Cal.3d at 426. See also *7978 Corporation v. Pitchess*, 41 Cal.App.3d 42, 46-47, 115 Cal.Rptr. 746 (1974). Notwithstanding their misgivings about the degree of protection to which such conduct may be entitled, federal and state courts have often balanced the governmental interest in the regulation of various activities with the prospect that such regulation may impinge on First Amendment guarantees. *Young v. American Mini Theatres, supra*, 427 U.S. at 78-82 (Powell, J., concurring) *Crownover v. Musick, supra*, 9 Cal.3d at 419. *City of Portland v. Derrington*, 253 Or. 289, 451 P.2d 111, 113, *cert. denied* 396 U.S. 901 (1969). Nude conduct in bars or public eating places has been found not to implicate First Amendment guarantees at all in some instances. *City of Portland*

v. Derrington, supra. The scope of permissible state or local regulation significantly increases as such activity encompasses acts which may violate valid penal statutes. *California v. LaRue, supra.*

The instant petition involves nude conduct by petitioner's employee which was not even within the shadow area between activity protected and unprotected under the First Amendment. The nude conduct of Miss Beauford was adjudged obscene and her conviction for violating California Penal Code Section 311.6 was sustained on appeal. *People v. Beauford,* 79 Cal.App.3d Supp. 1, 145 Cal.Rptr. 173 (1977). It is noteworthy that in another criminal proceeding arising from comparable conduct at petitioner's business establishment, such conduct was found not to be protected by the First Amendment under the authority of *Crownover v. Musick, supra. Austin v. Municipal Court,* 89 Cal.App.3d 269, 272, 152 Cal.Rptr. 400 (1979). See also *People v. Conway,* 103 Cal.App.3d Supp. 11, 162 Cal.Rptr. 877 (1979).

Under the supposition that the petitioner or others could present legitimate entertainment pursuant to an entertainment license, however, the petitioner argues that revocation of its entertainment license for its employee's unlawful conduct constitutes a prior restraint on its freedom of speech. Pursuing this contention to its endpoint, an entertainment license, once granted, could never be revoked or suspended by a licensing authority, even when unlawful conduct takes place pursuant to the license. Because arguably legitimate entertainment might be presented one day, the doctrine of prior restraint, petitioner theorizes, would preclude any disciplinary action which would have an impact on that prospect. The upshot would be that licensing by local governments of activities which may involve free speech considerations would be at an end. The petitioner's theory

of prior restraint has been rejected by each court which has considered it.

Licensing schemes such as Los Angeles County Ordinance No. 5860 have been enacted for the protection of the public health, safety, morals, and general welfare. *7978 Corporation v. Pitchess, supra,* 41 Cal.App.3d at 46-47. The lawful exercise of licensed activities is essential to the fulfillment of these objectives. Section 16 of Ordinance No. 5860 emphasizes the imperative that a license not be exercised in violation of the law. The grounds for denial of a license which may involve free speech are few but substantial. Section 82.7 of Ordinance No. 5860. Once granted, however, a license is necessarily subject to revocation if it is used to violate the law. Section 91 of Ordinance No. 5860. This is basic to any licensing scheme. A commonly recognized ground for the revocation of virtually any license is a violation of law in the exercise of a licensed activity.

Section 91.9(b)(1) of Ordinance No. 5860 provides for the suspension or revocation of an entertainment license where a licensee, his manager or employee has been convicted in a court of competent jurisdiction of violating any statute or ordinance while performing any act in the exercise of the license activity. The threshold requirement of a court conviction assures a rigorous determination as to any alleged violation(s) of law prior to the institution of any administrative proceeding. The potential class of persons subject to this ground of revocation is reasonably confined to proven criminal offenders affiliated with the licensed activity. California administrative bodies often rely on a prior judicial determination of the basis for criminal or civil liability. *Arenstein v. State Bd. of Pharmacy*, 265 Cal.App.2d 179, 71 Cal.Rptr 357 (1968). The critical determination of whether the proven violation was done in the furtherance of the licensed activity is determined by Respondent COM-

MISSION, subject to review by Respondent BOARD and the state trial and appellate courts. It is well settled in California that improper or unlawful acts of a licensee's employee are a basis for administrative discipline against the licensee. *Id. Mack v. Dept. of Alcoholic Bev. Control*, 178 Cal.App.2d 149, 154, 2 Cal.Rptr. 629 (1960). *Cornell v. Reilly*, 127 Cal.App.2d 178, 186-187, 273 P.2d 572 (1954). The principle that a licensee has the responsibility to see to it that its license is not used in violation of the law is followed in other jurisdictions, *i.e.* see *S & F Corp. v. Bilandic*, 62 Ill.App.3d 193, 198, 378 N.E. 2d 1137 (App.Ct. 1978).

Petitioner seeks to avoid this principle by theorizing that because the obscene live conduct of its employee was entertainment, purportedly, its license is insulated from revocation because entertainment is protected expression under Ordinance No. 5860. Because the petitioner was entitled to present entertainment under its entertainment license, it follows from petitioner's reasoning that it may present obscene live conduct in the guise of entertainment under the licensing scheme with impunity.

The purported entertainment ceased to be protected under the First Amendment as well as under Ordinance No. 5860 when it became a crime, however. Whatever the degree of protection to which nude dancing is entitled under the First Amendment, obscene live conduct is entitled to no protection at all. The prospect that the petitioner could or would have presented lawful entertainment cannot uplift what was presented to the status of protected expression. See Opinion of the California Court of Appeal in Appendix I to the Petition, pp. I-5 through I-6.

The petitioner nonetheless argues that it is on the same footing with an applicant for a bookstore license who is denied the license because of a prior conviction. *Perrine*

v. Municipal Court, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), however, involved completely different considerations than the instant case. Perrine had been in the bookstore business for several years when an ordinance was enacted requiring licensing of bookstores but effectively setting no standards governing the issuance of such licenses. Among the several grounds for denial was any conviction suffered by the applicant, his employees or associates within the previous five years for any of a variety of sex crimes or crimes of violence against the person. Perrine had been convicted of two such offenses and was denied a license as well as prosecuted for not having a license under the new ordinance. The ordinance was held unconstitutional as a prior restraint on First Amendment guarantees because it set no adequate standards for issuing licenses. It was also held unconstitutional to deny an applicant a bookstore license because he had suffered a prior conviction. *Perrine v. Municipal Court, supra*, 5 Cal.3d at 659-660.

The absence of any reasonable relation between the qualifications to run a bookstore and any past convictions of Perrine was emphasized as sufficient reason to invalidate the ordinance irrespective of First Amendment considerations *Id.* 5 Cal.3d at 663. An applicant who is denied the opportunity to engage in an occupation on the basis of some past misconduct may be deprived of a livelihood altogether. Yet the misconduct may be remote and unrelated to the occupation. Section 82.7 of Ordinance No. 5860 now reflects the teaching of *Perrine* with respect to applications for licenses which may involve free speech. Although petitioner contends that there are no published cases in California dealing with the questions raised in its petition (Petition, pp. 20-21), it has asserted that the *Perrine* case is controlling and that there is no distinction between the denial of an application for a license and the revocation of a license.

There is a clear distinction between proceedings involving the revocation of an existing license and proceedings involving the denial of a license application, however. *Martin v. Alcoholic Beverage, etc. Appeals Bd., #1* 52 Cal.App.2d 259, 264, 341 P.2d 291 (1959) Revocation or suspension involves situations in which a licensee or its employee may have abused or otherwise failed to adhere to requirements or conditions of its license. The relation between the licensed activity and any misconduct thereunder is virtually assured by the limiting application of Section 91.9(b)(1) of Ordinance No. 5860 solely to convictions arising from acts taken pursuant to the license sought to be revoked or suspended. *Perrine v. Municipal Court, supra,* is inapposite.

Likewise, *City of Seattle v. Bittner,* 81 Wash.2d 747, 505 P.2d 126 (1973) and *Alexander v. City of St. Paul,* 227 N.W.2d 370 (Minn., 1975) are of dubious relevance to the instant case. The *Bittner* case involved city denials of applications to operate a motion picture theater and to renew a motion picture theater license. It is apparent that the City of Seattle ordinance treated application procedures for license renewal applications the same as initial applications for a license. *City of Seattle v. Bittner, supra,* 505 P.2d at 127-128. The *Alexander* case ostensibly involved the revocation of a motion picture theater license, but an examination of the facts of the case suggests that it was more in the nature of a denial following a reconsideration. While the initial application was pending, the applicant was permitted to operate the motion picture theater without a license. Twenty-nine days before the license was granted, a ticket taker was convicted of violating an obscenity ordinance. Less than a month after the license was granted, the City of St. Paul sought to rescind the motion picture theater license on the basis of the ticket taker's conviction. Although the *Alexander* opinion refers to the terms "revocation" and

"rescission" in an interchangeable sense, the circumstances strongly suggest that the City of St. Paul sought to rescind its action granting the license because grounds existed to deny the license under the St. Paul ordinance at the time the license was granted.

The federal cases cited by the petitioner in support of the proposition that revocation of an entertainment license for prior convictions constitutes an invalid prior restraint also concern bookstores or motion picture theaters exclusively. Such activities have generally been accorded the greatest protection under the First Amendment because matter which is printed or depicted on a screen has qualities of permanence and communicative potential which exceed other forms of expression, particularly conduct. Although *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) does generally appear to equate denial with revocation of a bookstore license under the doctrine of prior restraint, it is significant that the ground of revocation or suspension for violating other provisions of the Peoria adult use ordinance was upheld to the extent that such other provisions were constitutional. *Id.* 619 F.2d at 1219, n. 42, and 1220 Section 91.9(b)(1) of Ordinance No. 5860 comparably necessitates that the conviction suffered relate to acts in the performance of the license activity. Further, the grounds for revocation or suspension that were held unconstitutional as prior restraints in *Genusa* did not require any express connection with exercise of the licensed activity. This distinguishes the broad provisions of the Peoria ordinance held unconstitutional from the provisions held constitutional, as well as from Section 91.9(b)(1) of Ordinance No. 5860.

Natco Theatres, Inc. v. Ratner, 463 F.Supp. 1124 (S.D.N.Y. 1979) and *Yuclan Enterprises, Inc. v. Arre*, 488 F.Supp. 820 (D. Haw. 1980) deal solely with licensing schemes for motion picture theaters. The *Natco Theatres*

opinion lumps together its discussion of denial and revocation of motion picture theatre licenses, relying chiefly on the *Perrine*, *Bittner*, and *Alexander* cases, which essentially involved denials, rather than revocations, of licenses based on prior convictions. *Natco Theaters v. Ratner*, *supra*, 463 F.Supp. at 1129-1130. Indeed, the New York City licensing scheme by its terms appears to be concerned chiefly with applicants who had previously held licenses or been in operation. *Id.*, 463 F.Supp. at 1128. Notwithstanding these cases, there is authority for the contrary proposition that revocation of a motion picture theater license for past violations of state obscenity and other statutes does not violate the constitutional prohibition against prior restraints. *106 Forsyth Corp. v. Bishop*, 362 F.Supp. 1389, 1396-1397 (M.D. Ga. 1972), *aff'd.* 482 F.2d 281 (5th Cir. 1973), *cert. denied* 422 U.S. 1044 (1973).

But such differences in federal decisions with regard to motion picture theater licenses should not necessitate the granting of the petition for writ of certiorari in the instant case. As previously emphasized the obscene live conduct of the petitioner's employee presents different considerations than the broad scope of protection afforded motion picture films and reading matter. Nude conduct is clearly subject to regulation, even though there may be an incidental burden on expression, where justified by valid governmental interests. *Crownover v. Musick*, *supra*, 9 Cal. 3d at 419, citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968) and *Konigsberg v. State Bar*, 366 U.S. 36, 49-51 (1961). Under the circumstances of the instant case, as applied to the petitioner, the revocation of its entertainment license for its employee's conduct does not significantly burden protected expression, while it does serve the important governmental interests of fostering public morals and general welfare.

II.

Petitioner's Claim of Facial Overbreadth Is Not Real and Substantial.

This Court has cautioned that facial overbreadth adjudication has a limited function, particularly where conduct, is involved, which, while arguably expressive, may run afoul of valid criminal laws. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Any claimed overbreadth must be real and substantial. *Id.* Unlike the adult bookstore operator in *Schad v. Mt. Ephraim*, ... U.S. ..., 68 L.Ed.2d 671 (1981), the petitioner cannot reasonably contend that protected expression of others is comparably impaired by Section 91.9 of Ordinance No. 5860. Whereas the Mt. Ephraim zoning ordinance excluded all live entertainment from that borough, Section 91.9 essentially admonishes licensees to conduct their licensed business in a lawful manner. The prospect of curtailment or even chilling protected expression by the existence of various grounds for suspension or revocation of licenses is not a real and substantial threat. The examples of threats perceived by the petitioner are facile and dubious. Although petitioner has not clearly articulated the facial overbreadth claimed to inhere in Section 91.9 of Ordinance No. 5860, Respondents submit that any overbreadth may be readily cured as it arises by appropriate narrowing constructions.

III.

Petitioner Was Afforded But Failed to Avail Itself of Its Procedural Rights.

The petitioner has cited no meaningful authority for the proposition that it was deprived of constitutionally required safeguards. The burden of instituting administrative proceedings to revoke the petitioner's entertainment and public eating licenses was undertaken by Respondent SHERIFF,

who had the burden of proof as to the grounds for revocation. The petitioner filed its notice of defense and availed itself of its right to a hearing. The petitioner had the right to request the issuance of subpoenas to compel the attendance of witnesses and production of documents, to be present at the hearing through its corporate directors or officers, to be represented by counsel, to call and examine witnesses under oath, to introduce exhibits, and generally to rebut and adduce evidence. No one appeared or testified at the hearing other than the petitioner's attorney. No findings of fact were requested by the petitioner or his attorney. There was no lack of procedural safeguards available to the petitioner at any stage of the administrative, trial court and appellate stages of this case.

IV.

There Were Adequate Grounds Alleged and Proven to Support the Revocation of Petitioners Public Eating License.

The undisputed testimony of deputy sheriff Petrie supported the allegations of the accusation and showed that the licensee's employee engaged in the alleged conduct both as a waitress and as a purported entertainer. The petitioner is essentially raising evidentiary questions in an effort to challenge the factual findings below. Both the trial and appellate court below found that the revocation of the petitioner's public eating license was validly based on abuse of that license.

V.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari herein should be denied.

Respectfully submitted,

JOHN H. LARSON,
County Counsel,
By PATRICK T. MEYERS,
Deputy County Counsel,
Attorneys for Respondents.

APPENDIX 1.

Notice of Defense.

Business License Commission, County of Los Angeles, State of California.

In the Matter of Darcly Inc., Officers of Record: Clyde L. Wright (deceased), President, Margaret S. Wright, Secretary Treasurer, John S. Andersen, Vice President, Change of Directors — application pending: Margaret S. Wright, President, Floyd J. Leroy, Vice President, Horace Rhodes, Secretary, dba Clyde's 13319-21 E. Imperial Highway, Whittier, California. Accusation No. 412.

Pursuant to Los Angeles County Ordinance 5860, Section 135, et seq., respondent DarCly, Inc. hereby files this Notice of Defense and requests a hearing to contest the charges contained in said accusation, and by way of further defense states that:

1. The Accusation fails to state factual grounds upon which the Commission may proceed.

2. The conviction of Deborah Beauford has been appealed and is not yet final. Thus, it does not provide grounds upon which the Commission may proceed.

3. Since the Accusation involves conduct potentially protected by the First Amendment, revocation may not be premised upon Ordinance 5860, Sections 92(b), 92(c), 92(f), 92(j) and 92(k).

Dated: November 19, 1976

/s/ Kenneth P. Scholtz
KENNETH P. SCHOLTZ
Attorney for Respondent.

APPENDIX 2.

Petition for Writ of Mandate and for Stay Order.

Superior Court of the State of California for the County of Los Angeles.

Darcly, Inc., a California corporation, dba Clyde's, Petitioner, vs. County of Los Angeles, the Business License Commission of the County of Los Angeles and the License Appeals Board of the County of Los Angeles, Respondents. Peter J. Pitchess, Sheriff of the County of Los Angeles, Real Party in Interest. C226906.

Filed: January 17, 1978.

Petitioner Darcly, Inc., alleges that:

1. At all times mentioned herein, petitioner was and now is a corporation duly formed and existing under the laws of the State of California and was and now is the owner and operator of the premises known as Clyde's, 11319-21 East Imperial Highway, County of Los Angeles.

2. At all times mentioned herein, respondent County of Los Angeles, was and now is a County formed and existing pursuant to charter under the laws of the State of California.

3. At all times mentioned herein, respondent Business License Commission, was a board duly formed and existing pursuant to Ordinance No. 5860 of the County of Los Angeles, having authority to grant, deny, suspend or revoke various business licenses issued by respondent County, including but not limited to those licenses issued to petitioner.

4. At all times mentioned herein, respondent License Appeals Board of the County of Los Angeles, was a board duly formed and existing pursuant to Ordinance 5860 of the County of Los Angeles, having authority to hear and rule

on appeals from decisions of respondent Business License Commission.

5. At all times mentioned herein, real party in interest Peter J. Pitchess, was and now is the duly elected and acting sheriff of the County of Los Angeles.

6. At all times mentioned herein, petitioner Darcly, Inc., has been the holder of the following business licenses issued by respondent County of Los Angeles for the premises known as Clyde's: Entertainment License, Class I and Public Eating.

7. On or about November 4, 1976, real party in interest Peter J. Pitchess, filed an accusation with respondent Business License Commission seeking revocation of petitioner's entertainment and public eating license based on the grounds that an entertainer employed at Clyde's had engaged in various acts which led to her arrest and conviction for violation of Section 311.6 of the California Penal Code. A true and correct copy of said accusation is attached hereto as "Exhibit I" and incorporated herein by reference.

8. On or about November 19, 1976, petitioner filed a notice of defense to the accusation. A true and correct copy of said notice of defense is attached hereto as "Exhibit II" and incorporated herein by reference.

9. On or about January 12, 1977, a hearing was held on the accusation before respondent Business License Commission. A true and correct copy of the reporter's transcript of said hearing is attached hereto as "Exhibit III" and incorporated herein by reference. At the conclusion of the hearing the matter was taken under submission.

10. On or about February 2, 1977, respondent Business License Commission met in executive session to consider said accusation, at the conclusion of which it voted to revoke petitioner's license by a vote of three to two. A true and

correct copy of the reporter's transcript of said session is attached hereto as "Exhibit IV" and incorporated herein by reference.

11. On or about February 7, 1977, respondent Business License Commission gave written notice of its order to petitioner. A true and correct copy of said order is attached hereto as "Exhibit V" and incorporated herein by reference.

12. On or about February 15, 1977, petitioner duly filed a notice of appeal to respondent License Appeals Board.

13. On or about December 28, 1977, respondent License Appeals Board denied a hearing to petitioner. A true and correct copy of the notice of denial, which was made without written or oral argument, is attached hereto as "Exhibit VI" and incorporated herein by reference.

14. Grounds exist for the granting of this petition pursuant to Section 1094.5 of the Code of Civil Procedure in that petitioner did not have a fair trial, respondents did not proceed in the manner required by law, the findings are not supported by the evidence and the decision is not supported by the findings in that:

(a) Sections 91.9, 92(b), 92(c), 92(e), 92(f) and 92(k) of Los Angeles County Ordinance 5860 is unconstitutional on its face and as applied herein in that they violate due process by arbitrarily and unreasonably restricting participation in a lawful business and by imposing an unconstitutional prior restraint on the exercise of free speech.

(b) Sections 91.9(b), 92(b), 92(c), 92(e), 92(f) and 92(k) of Los Angeles County Ordinance 5860 are unconstitutionally vague and uncertain on their face and as applied herein.

(c) Respondent Business License Commission failed to make specific findings and conclusions as required by law.

(d) Respondent Business License Commission committed a prejudicial abuse of discretion and imposed an excessively severe penalty when it ordered revocation of petitioner's license based upon a single violation of law by an employee.

(e) There was no substantial evidence to support the findings that petitioner violated Sections 92(c), 92(e), 92(f) and 92(k) of Los Angeles County Ordinance 5860.

15. Petitioner has exhausted all administrative remedies available to it and has no plain, speedy and adequate remedy at law other than to seek judicial review by way of this petition.

WHEREFORE petitioner prays for relief as follows:

1. For a judgment setting aside the decisions of respondents and for a peremptory writ of mandate directing respondents to reinstate and reissue petitioner's entertainment and public eating licenses, or to take such other action as the court deems appropriate;

2. For an order staying enforcement of respondent's decisions pending final determination of this petition;

3. For costs of suit;

4. For reasonable attorneys fees;

5. For such other and further relief as the court deems proper.

Dated: January 6, 1978

/s/ Kenneth P. Scholtz
KENNETH P. SCHOLTZ
Attorney for Petitioner.

APPENDIX 3.

Notice.

Department of Alcoholic Beverage Control of the State of California.

In the Matter of the Accusation Against, Darcly, Inc., Clyde's 13319-21 Imperial Hwy., Whittier, on-sale beer license, Respondent under the Alcoholic Beverage Control Act. File 3839. Reg. 8225.

The Alcoholic Beverage Control Appeals Board having affirmed the decision of the Department of Alcoholic Beverage Control in the above matter and the Supreme Court having denied hearing therein, the decision of the Department dated June 8, 1978, is now final.

A representative of the Department will call on you on or after September 4, 1979, to pick up the license certificate.

Sacramento, California

Dated: August 23, 1979

C. E. Cameron, Jr.

C. E. CAMERON, JR.
CHIEF COUNSEL

APPENDIX 4.

Judgment Dismissing Action.

United States District Court Central District of California.

Darcly, Inc., a California corporation, Plaintiff, v. Peter J. Pitchess, Sheriff of the County of Los Angeles, Defendant. Case No. CV 78-4333 MRP.

Filed: January 15, 1979.

On December 11, 1978, Defendant's motion to dismiss this action was heard by the Court in the courtroom of the Honorable Mariana R. Pfaelzer. In accordance with the Findings of Fact and Conclusions of Law filed herein on December 29, 1978.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above entitled action shall be and hereby is dismissed, with each party to bear their own costs of suit incurred.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, a copy of this Judgment on counsel for the parties in this matter.

DATED: January 12, 1979

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge.

APPENDIX 5.

Findings of Fact, Conclusions of Law and Order Denying Motion for Preliminary Injunction and Granting Motion to Dismiss.

United States District Court Central District of California.

Darcly, Inc., a California corporation, Plaintiff, v. Peter J. Pitchess, etc., Defendant. Case No. CV 78-4333 MRP.

Filed: December 29, 1978.

Plaintiff's motion for a preliminary injunction and Defendant's motion to dismiss this action were heard on December 11, 1978. Evidence having been presented and considered by the Court, the matter having been fully argued and submitted, and proof being made to the satisfaction of the Court, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff, DARCLY, INC., is a California corporation, which has owned and operated a business establishment known as "Clyde's" at 13319-21 East Imperial Highway in the unincorporated area of the County of Los Angeles.

2. The defendant, PETER J. PITCHESS, is the Sheriff of the County of Los Angeles, whose law enforcement responsibilities include enforcement of Los Angeles County Ordinance No. 5860.

3. In addition to an on-sale beer license issued by the State of California Department of Alcholic Beverage Control, the plaintiff has held various licenses under Los Angeles County Ordinance No. 5860, including entertainment and public eating licenses. In accordance with the provisions of said ordinance, an accusation was filed on or about November 9, 1976, by the defendant against the plaintiff rec-

ommending revocation of the plaintiff's entertainment and public eating licenses. Following an administrative adjudication pursuant to Ordinance No. 5860, the accusation was found true and the plaintiff's entertainment and public eating licenses were revoked on or about February 2, 1977, by administrative order of the Business License Commission of the County of Los Angeles.

4. The License Appeal Board of the Couunty of Los Angeles denied plaintiff's administrative appeal on December 28, 1977. Thereafter, on or about January 12, 1978, the plaintiff brought an administrative mandamus proceeding in the Los Angeles County Superior Court to set aside and to stay the administrative revocation order. On or about May 8, 1978, the Superior Court denied the petition for writ of administrative mandamus and dissolved the stay order as of the expiration of the time during which an appeal might be taken, or upon filing of notice of appeal, whichever occurred first.

5. On or about July 6, 1978, the plaintiff filed a notice of appeal to the Court of Appeal of the State of California thereby extending the stay of the administrative revocation order twenty (20) days to July 26, 1978, pursuant to California Code of Civil Procedure 1094.5.

6. On or about July 26, 1978, plaintiff's petition for a writ of supersedeas and stay order of the administrative revocation order, filed July 17, 1978, with the Court of Appeal of the State of California, was denied.

7. On or about August 1, 1978, the plaintiff filed a petition with the Supreme Court of the State of California for hearing from the order denying its petition for writ of supersedeas and stay order and for a temporary stay order. On or about August 16, 1978, the California Supreme Court denied that petition.

8. Plaintiff's appeal of the Superior Court judgment denying its petition for peremptory writ of mandamus to set aside the administrative revocation order is pending in the Court of Appeal of the State of California.

9. The plaintiff elected to close its business establishment on or about October 26, 1978, following an inquiry by a Los Angeles County deputy sheriff as to its intentions with respect to the expiration and subsequent state appellate court denials of a stay order of the administrative order revoking the plaintiff's entertainment and public eating licenses.

10. The plaintiff made no showing of irreparable injury or harm. The plaintiff's showing as to this issue consisted essentially of its president's opinion that although the business establishment can remain open and operating, it would not be as profitable without the continuance of activities subject to the administrative revocation order.

11. The plaintiff did not make a showing that the challenged ordinance is patently or flagrantly unconstitutional.

12. The plaintiff did not show bad faith, harassment, or any other unusual circumstance on the part of the defendant that would call for equitable relief or that would otherwise justify federal intervention in the pending appellate proceedings in the Court of Appeal of the State of California.

CONCLUSIONS OF LAW

1. Federal intervention prior to the completion of state appellate proceedings is contrary to the doctrines of federalism, comity and equitable restraint. *Younger v. Harris*, 402 U.S. 37 (1971).

2. Federal injunctive relief is not available absent a showing of great and immediate, irreparable injury. *Huffman v. Pursue*, 420 U.S. 592, 601 (1974).

3. A Federal Court should not act to restrain the state law enforcement process absent extraordinary circumstances such as bad faith, harassment by state officials, or flagrant and patent unconstitutionality of a state law. Id at 602.

4. The plaintiff is not entitled to a contemporaneous federal forum for its federal claim, and thus must first exhaust its state appellate remedies before seeking relief from this Court. Id at 606.

Based on the above stated findings of fact and conclusions of law,

IT IS ORDERED that the motion of plaintiff for preliminary injunction is denied.

IT IS FURTHER ORDERED that defendant's motion to dismiss the above entitled action is granted.

DATED:

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge